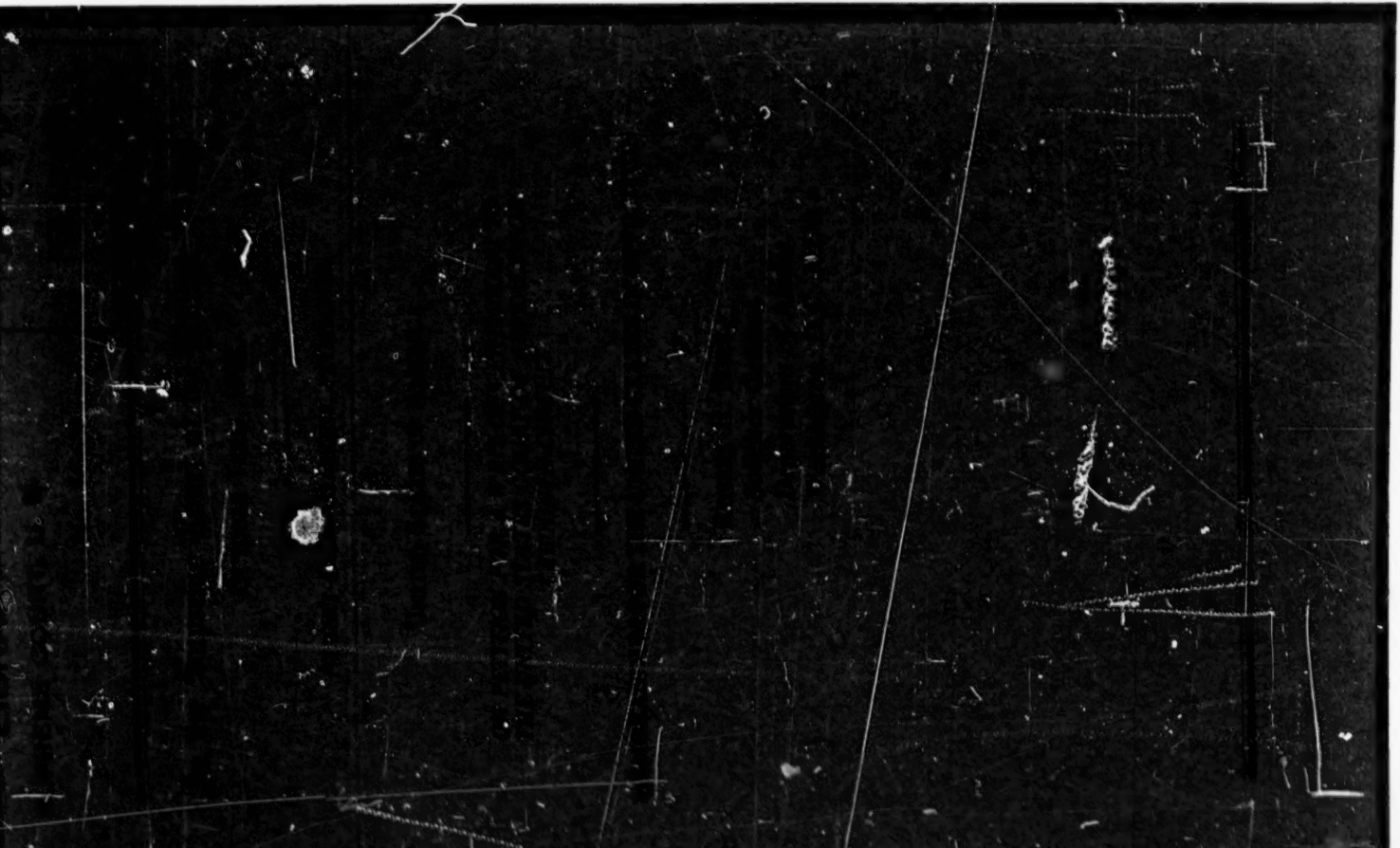

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-630

ALBERT JAMES HASKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that he should have been prosecuted for a misdemeanor under 42 U.S.C. 408(c) rather than for a felony under 18 U.S.C. 1001 and (2) that the court erred in permitting the government to cross-examine his character witnesses regarding a letter, which questioned certain of his medical practices, sent to him by a local medical organization.

Petitioner was originally charged in a fifteen-count indictment with having made false Medicare claims, in violation of 18 U.S.C. 1001 and 42 U.S.C. 408(c). The individual counts in the indictment covered claims submitted by petitioner for fifteen different patients during the period from approximately December 1, 1967, through April 25, 1969. By the time of trial, all but one of the fifteen patients specifically referred to in the indictment had either died or otherwise become unavailable. The fifteenth pa-

tient—Carolyn Todd— did testify, however; and petitioner was ultimately convicted by a jury in the United States District Court for the Eastern District of California of having made false claims for the services rendered by him to Mrs. Todd, in violation of 18 U.S.C. 1001. Petitioner was sentenced to one year's imprisonment and fined $10,000. The court of appeals affirmed (Pet. App.).

The evidence adduced at trial showed that petitioner, a medical doctor, submitted Medicare bills for payment covering 243 visits allegedly made by him to Mrs. Todd during the period from August 1, 1968, through March 31, 1969—a period of 243 days (Tr. 97-98). Mrs. Todd testified that petitioner had not visited her every day, as he had claimed, but had "kept track of [her] on a weekly basis" (Tr. 400). Another witness testified that doctors were permitted, without special authorization, to charge Medicare for two routine visits per month to patients in extended care facilities but that there were no comparable limits on the number of chargeable visits to patients in acute care facilities (Tr. 422-424). The bills submitted by petitioner for his visits to Mrs. Todd were coded to indicate that he visited her in an acute care facility when in fact she was at the time in an extended care facility (Tr. 399-400). Various other witnesses testified that petitioner visited Mrs. Todd in the extended care facility between once per week and once per month, rather than daily (Tr. 117, 195, 255, 317).

1. Petitioner first contends that he should have been prosecuted for a misdemeanor under 42 U.S.C. 408(c) rather than for a felony under 18 U.S.C. 1001. This contention was specifically rejected in *United States* v. *Chakmakis*, 449 F.2d 315 (C.A. 5). Since petitioner's fraudulent conduct fell within the provisions of both statutes, the government, in its discretion, could elect to prosecute under the statute providing for the harsher penalty.

See *United States* v. *Gilliland,* 312 U.S. 86, 95-96; *United States* v. *Fournier,* 483 F.2d 68, 69 (C.A. 5); *United States* v. *Brown,* 482 F.2d 1359, 1360 (C.A. 9); *Mauney* v. *United States,* 454 F.2d 273, 274 (C.A. 6); *United States* v. *Eisenmann,* 396 F.2d 565, 568 (C.A. 2).

2. Petitioner also contends that the government improperly cross-examined his character witnesses regarding a letter sent to him by a local medical organization, the Foundation for Medical Care of Tulare County ("Foundation"). During the trial, petitioner introduced several character witnesses who vouched for his honesty and integrity. On cross-examination the government asked these witnesses whether they had heard that the Foundation had sent petitioner a letter of reprimand in connection with his services to Medi Cal patients (Tr. 492, 494, 545-547, 555-556, 565, 570-571, 575).[1] The thrust of the letter was to prohibit petitioner from performing certain types of surgery on Medi Cal patients without receiving prior authorization.[2]

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[1]Each character witness was asked substantially the following question (Tr. 556):

> Have you heard that from June 1, 1968, Doctor Haskins was prohibited by the Foundation for Medical Care of Tulare County from performing tonsillectomies and adenoidectomies on Medi Cal patients because he was doing so far in excess of the average number performed by physicians in that area, and that he was prohibited from doing this without first obtaining prior approval?

The government initially characterized the letter from the Foundation as a "censure" (Tr. 492, 494). After objection, the court instructed the jury to disregard the government's use of the word "censure," and thereafter the government characterized the letter as a "prohibition" (Tr. 547, 555-556, 565, 570-571, 575). However the letter might appropriately be characterized, the fact remains that the limitations imposed on petitioner in connection with surgeries performed by him under the Medi Cal program were at the time highly unusual (Tr. 586, 597-598).

[2]A copy of the letter appears in the trial transcript at pages 500-501.

Once petitioner had called character witnesses, the government was entitled to test the reliability of their testimony by asking specific questions relevant to the character traits vouched for on direct examination. As this Court noted in *Michelson* v. *United States,* 335 U.S 469, 479:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion.

Petitioner's reputation for honesty and integrity would undoubtedly have been damaged by his having been reprimanded publicly by a local medical body for having performed too many surgeries. This is not a case, therefore, in which the question asked of petitioner's character witnesses on cross-examination was irrelevant to the character traits petitioner put in issue. Neither is this a case in which a groundless question was asked by the government in order "to waft an unwarranted innuendo into the jury box." *Michelson* v. *United States, supra,* 335 U.S. at 481. The letter that formed the basis of the government's cross-examination of petitioner's character witnesses was in the government's possession before any questions involving it were asked, and a copy of the letter was made immedi-

ately available to petitioner. At no time, moreover, has petitioner suggested that he did not receive the letter. Cf. *United States* v. *Machado*, 457 F.2d 1372, 1376 (C.A. 9); *United States* v. *Beno*, 324 F.2d 582, 588 (C.A. 2), certiorari denied, 379 U.S. 880. Petitioner's sole objection to the government's use of the letter is instead that it was highly unlikely that any of his character witnesses would have heard about it, since it "was, and should be, a confidential communication" (Pet. 18).

Whether the letter should have been kept confidential is irrelevant, however, to the issue of whether it was properly used by the government. In fact, the letter was not kept confidential. In addition to sending a copy of the letter to petitioner, the Foundation also sent a letter to the hospital at which petitioner was authorized to perform surgery, informing it of the action taken by the Foundation. The reason for this was that, if petitioner did not respect the terms of the letter and performed certain types of surgery on Medi Cal patients without prior authorization, subsequent Medi Cal payments to the hospital would have been affected (Tr. 502).

Petitioner's claim that the letter was kept confidential is also inconsistent with the admission by one of his character witnesses that she was generally familiar with its contents. On cross-examination, petitioner's first character witness was asked whether she had heard that petitioner had been prohibited from performing certain types of surgery without prior authorization. She responded as follows (Tr. 494):

> A. I didn't know what the problem was; I knew there was some talk around that Medi Cal or Medicare or somebody was censuring him, or trying to obtain information about him.

In these circumstances, the question put to petitioner's character witnesses by the government concerning the Foundation's letter was entirely proper. The question was used to test the reliability of those witnesses' testimony, and the jury was fully capable of determining whether any lack of knowledge of such communication undermined the particular witness's evaluation of petitioner's reputation in the community.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General

FEBRUARY 1975.